Drafting Non-Competes for Use in Multiple Jurisdictions: How Many Contracts Does Your Company Need?

Insights
7.26.12

For companies with employees in multiple jurisdictions, creating a single non-compete agreement for use by employees throughout the country can be tempting.A single agreement is less expensive to draft than multiple agreements, and less cumbersome to distribute to employees in different states.But will a single agreement be enforceable in multiple jurisdictions?The answer:it depends where the company's employees are located.The laws governing enforceability of restrictive covenant agreements vary by state, and an agreement that is enforceable in one state may well be unenforceable in another. Depending upon the jurisdiction, the risk of attempting to use a single agreement in multiple states can vary from simple unenforceability to exposure to a claim for damages for requiring an employee to sign an unenforceable agreement.

The following is a brief summary of some of the issues that vary from state to state and that should be considered when determining how many agreements a company needs and how to maximize the likelihood of enforcement of a company's agreements across jurisdictions:

1.The duration and geographic scope of the covenant.
In evaluating whether the terms of the agreement at issue are reasonable, most jurisdictions will scrutinize the duration and geographic scope of the covenant to determine whether it is reasonable.What is reasonable in one state may not be reasonable in another.Although the analysis will likely be fact-based in most states, in others, it may also be a matter of statute.Some states specify, for example, that any covenant that is beyond two years in length is presumptively unenforceable.Other states absolutely require that a covenant contain a geographic limitation in order to be reasonable.In Louisiana, for example, a statute dictates that unless the restrictive covenant names the specific parishes to which it applies by name, it will not be enforced.

2.Does the state permit "modification" or "blue-penciling" of overly broad covenants?
Some states permit courts to revise overly broad covenants to make them enforceable.For example, in Pennsylvania, a court has discretion to modify the terms of an overly broad covenant if they are unreasonable as drafted.Other states, like North Carolina, follow a strict "blue pencil" approach, meaning that courts in those jurisdictions will not rewrite a contract if it is too broad, but will simply not enforce it.In "blue pencil" states, if the contract is separable, and one part is reasonable, the courts are permitted to enforce the reasonable provisions.Still other jurisdictions, like Georgia, do not permit courts to enforce any portion of an agreement if even one part is unenforceable as drafted.Where courts will not modify an agreement, or will strike unenforceable provisions, it is

drafted. Where courts will not modify an agreement, or will strike unenforceable provisions, it is particularly important to scrutinize every portion of the agreement to ensure that each provision is enforceable as written.

3.What constitutes adequate consideration for the restrictive covenant?

As is the case with any agreement, a restrictive covenant must be supported by consideration to be enforceable.In some states, if a restrictive covenant is signed after the commencement of employment, it must be supported by new and independent consideration, such as a promotion or a raise, in order to be enforceable.In other states, the promise of continued employment constitutes sufficient consideration in exchange for execution of the covenant.If covenants are being distributed to employees in multiple jurisdictions after the commencement of employment, the company should be aware of the law in each jurisdiction to determine whether new consideration is necessary to make the covenant enforceable.

4.Is the covenant is assignable?

In some jurisdictions, corporate acquisitions and mergers can raise issues about the enforceability of a restrictive covenant.Some states permit assignment of the covenant to the purchaser as a matter of course regardless of whether the employee consents to the assignment.Other states, such as Pennsylvania, do not.In Pennsylvania, the court will consider the nature of the transaction in determining whether the covenant is assignable without employee consent.Still other states will require employee consent regardless of the nature of the transaction.Employers should be aware of the requirements of the states in which they do business and should make efforts to obtain express consent where it is required.In some jurisdictions, this can be accomplished through the incorporation of an assignment provision in the agreement.

5.Is the covenant enforceable if the employee is terminated?

Even if the covenant is otherwise enforceable, some states will not permit enforcement of a restrictive covenant if an employee is terminated by his or her employer.Other states, like Massachusetts, will examine whether the termination was conducted arbitrarily or in bad faith in determining whether the covenant is enforceable.The company should be mindful of the requirements for the jurisdictions in which its employees are signing restrictive covenants and ensure that any terminations are conducted with knowledge of the impact they may have on an existing restrictive covenant.Where the state in which the employee is located is likely to evaluate the circumstances surrounding the termination in determining whether the covenant is enforceable, special care should be taken to properly document the reasons for the termination.

6.When and how the covenant must be presented to be enforceable?

Some states have specific requirements as to when and how a covenant must be presented to an employee.In those states, an employer may be required to present the covenant at the time the offer is extended, or prior to the commencement or employment.North Carolina has specific requirements for the timing and manner of presentation of restrictive covenants, for example.Other states have similar requirements.An otherwise enforceable agreement can be rendered unenforceable in these states unless it is presented to an employee at the right time and in the right manner.It is therefore important to evaluate the requirements in each state in which the covenant is

manner.It is therefore important to evaluate the requirements in each state in which the covenant is being presented to employees to ensure that the timing and manner of presentation of the covenant meets all applicable requirements.

7.Does the state permit provisions extending the period of the restrictive covenant in the event of an injunction?

Many states permit provisions in agreements that purport to extend the period of a restrictive covenant by the amount of time in which it was violated prior to entry of an injunction.For example, in those states, an employee with a one-year non-competition agreement who violates the agreement by working for a competitor for one month before being enjoined from further competition may be enjoined for the remaining duration of the covenant plus one month in order to account for the period in which the employee was violating the agreement.While many states permit this type of extension of the covenant, some states expressly forbid it, and in other states, the court is unlikely to extend the covenant absent specific language in the agreement allowing such an extension.It is important to consider the jurisdiction and tailor the language of the covenant and any provisions relating to injunctive relief accordingly if the company is interested in attempting to obtain an injunction that extends the period of the restrictive covenant to account for any period of non-compliance.

8.Does the state permit non-competition agreements at all?

Some states, such as California, do not permit non-competition agreements in any form.In those states, although the company cannot present employees with a non-competition agreement, the company may have reasonable alternatives that would still afford some protection.In California, for example, while a non-competition agreement is not enforceable, a properly drafted confidentiality agreement is enforceable.

9.What types of employees will be signing the restrictive covenants?

Most states commonly ask whether a restrictive covenant contains restrictions that are reasonably necessary to protect one or more of an employer's legitimate interests.Commonly recognized legitimate interests include confidential information, customer relationships, and unique or unusual training.Consequently, it is important to consider the types of employees who will be signing the restrictive covenants and to think about what interest the company seeks to protect.It may be easier to justify a broad geographic restriction on competition for employees with access to confidential information that could be used throughout a geographic region.Similarly, when an employer seeks to protect against the exploitation of customer relationships, a non-solicitation agreement may suffice.

In sum, although the law can vary significantly from jurisdiction to jurisdiction, this does not mean that employers must have separate agreements for every state in which they do business.Generally, a handful of agreements will suffice to address the variations in law between different jurisdictions, as there is significant overlap between the law of many jurisdictions.The key to ensuring enforcement of restrictive covenants in multiple jurisdictions is to be knowledgeable about the differences in state law and to address those differences both in the agreements themselves and in the manner in which they are presented and enforced.

the manner in which they are presented and enforced.

Related People

Risa B. Boerner, CIPP/US, CIPM
Partner
610.230.2132
Email